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No. 07-545

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In The
Supreme Court of the United States

VAN ELK, LTD. AND MORILLO CONSTRUCTION, INC.,

Petitioners,

v.

JOSE REYES, FRANCISCO REYES, JOSE PEREZ AND CARLOS FLORES,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

ARGUMENT

I. RESPONDENTS HAVE FAILED TO DISTINGUISH THE FACTS OF THIS CASE FROM *HOFFMAN*.

Van Elk, Ltd. and Morillo Construction, Inc. (together "Van Elk") respectfully urge this Court to extend its holding in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), to this case because the pertinent facts in this case closely mirror the facts used by this Court to decide *Hoffman*. Respondents attempt to divert attention from the similarities between the prevailing wages at issue here, and the backpay they resemble, by relying on a red herring, minimum wage-based argument that is not supported by the law.

California minimum wage law relies substantially on private enforcement to prosecute violations of the minimum wage law and to deter would-be offenders. *See* Cal. Lab. Code § 1171 *et seq*. Respondents argue that prevailing wage enforcement will suffer if illegal aliens are unable to sue privately for violations. (Resp't Br. 10-11.) However, unlike minimum wage law, prevailing wage law relies almost exclusively upon state-initiated enforcement. *See* Cal. Lab. Code § 1775 *et seq*. Therefore, even if illegal aliens can no longer sue to enforce the prevailing wage law, employers will still be subject to state-initiated civil and criminal penalties. As a result,

Respondents have failed to show any material difference between *Hoffman* and this case.

In *Hoffman*, this Court explained how federal labor laws would continue to deter would-be violators of federal labor laws, even if illegal aliens could no longer sue for post-termination backpay. *See Hoffman*, 535 U.S. at 139. This Court noted that the threat of private enforcement by wronged employees was only one of multiple sanctions that would deter employers from violating the law:

> [l]ack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman – sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. Hoffman will be subject to contempt proceedings should it fail to comply with these orders. We have deemed such "traditional remedies" sufficient to effectuate national labor policy regardless of whether the "spur and catalyst" of backpay accompanies them.

Id. (internal citations omitted)

Likewise, the civil and criminal penalties of California prevailing wage law deter employers from violating the prevailing wage law by ensuring that they will not get off "scot-free" if illegal aliens cannot

privately enforce prevailing wage law. *See* Cal. Lab. Code §§ 1171.2, 1775-1780.

Respondents argue that deterrence is all but impossible absent private enforcement by employees. (Resp't Br. 10-11.) They point out that California's minimum wage law also has an enforcement scheme and suggest that private enforcement is as important to California's prevailing wage law as it is to the minimum wage law. (*Id.* at 10.) Respondents' argument fails, however, because it is unsupported by the California's statutes.

Under California law, minimum wage enforcement is neither the same nor substantially similar to prevailing wage enforcement. *See* Cal. Lab. Code § 1171 *et seq*. California's minimum wage enforcement scheme is primarily compensatory in nature and empowers both aggrieved employees and the California Division of Labor ("DOL") to maintain an action to collect unpaid minimum wages. *See* Cal. Lab. Code §§ 1193.6, and 1194, respectively. It also permits recovery of liquidated damages, and establishes a good faith defense against an award of liquidated damages. Cal. Lab. Code § 1194.2. In cases of a willful violation, the statute permits a court to grant injunctive relief. Cal. Lab. Code § 1194.5.

In contrast, the prevailing wage law has both compensatory and punitive aspects and is much tougher on employers who fail to comply with it. Like minimum wage law, it permits an aggrieved employee to sue for wages; however, it also significantly expands

the state's ability to pursue violating employers. It empowers the state to collect unpaid wages on behalf of aggrieved workers. Cal. Lab. Code § 1775. It imposes statutory penalties upon an employer to be paid to the state, *id.*, and imposes criminal sanctions for "[a]ny officer, agent, or representative of the State . . . and any contractor, or subcontractor or agent. . . ." who willfully fails to comply with the prevailing wage law. Cal. Lab. Code. § 1777. The prevailing wage law also imposes other criminal sanctions on violations, *see* Cal. Lab. Code § 1778-1780, and in some cases, denies "the right to bid on or be awarded or perform work . . . on any public works contract for a period of . . . one . . . [to] up to three years" for violating the law. Cal. Lab. Code § 1777.7.

Respondents either ignore, or fail to recognize, these key differences between California's prevailing wage law and minimum wage law. Respondents suggest that California's prevailing wage law, like its minimum wage law, will go unenforced if illegal aliens cannot sue individually. (Resp't Br. 10-11.) Yet, in under the prevailing wage statute, the state is frequently the *only* entity empowered to enforce the law. *See* Cal. Lab. Code § 1775, §§ 1777-1780. By contrast, a private individual can initiate an action to recover a shortfall in prevailing wages only under section 2698 of the California Labor Code.

This is significant because it wholly refutes Respondents' claim that, absent private enforcement, prevailing wage law will go unenforced. As the statute shows, the prevailing wage law depends almost

exclusively on state enforcement because only the state can charge violators with crimes and collect the penalties owed to the state. Respondents argue that diminished private enforcement of the minimum wage laws might weaken the deterrent effect on employers – however, even if true for minimum wages, this is not true for prevailing wages. A significantly stronger state enforcement scheme governs the enforcement of prevailing wages and the threat of criminal penalties and banishment from future public projects will continue to deter employers from violating the prevailing wage law.

Respondents' discussion of California's Labor Code Private Attorney General Act of 2004, which allows employees to enforce its labor laws by suing for any shortfall in their wages, Cal. Lab. Code § 2698 *et seq.*, is likewise irrelevant. For, even without the ability of illegal aliens to use that Act to sue civilly for prevailing wages, California is able to use a host of "traditional remedies," including State enforced civil penalties, wage differential collection and criminal sanctions, to ensure that an offending employer is held liable. *Hoffman*, 535 U.S. at 139.

Ultimately, Respondents' attempt to distinguish the facts here from those in *Hoffman* fails and Petitioners respectfully request that this Court extend *Hoffman* and foreclose the ability of illegal aliens to maintain a private civil action to recover prevailing wages. The prevailing wage law is imbued with state-initiated administrative, civil, and criminal penalties. Even if illegal aliens are no longer able to sue

individually for violations of the prevailing wage law, state enforcement scheme will insure the employers continue to comply with the prevailing wage law.

II. RESPONDENTS HAVE FAILED TO ADDRESS, LET ALONE REBUT, VAN ELK'S SUPREMACY CLAUSE ARGUMENTS.

Respondents have failed to rebut Van Elk's argument that Respondents' claims, like the illegal aliens' claims in *Hoffman*, exist only due to a violation of federal immigration law, which required that the Court of Appeals apply *Hoffman*. This failure by Respondents robs them of any basis to argue that this Court should not clarify that Congress intended, with its adoption of federal immigration laws, to bar illegal aliens from collecting prevailing wages, including those pursuant to California law.

Likewise, Respondents have failed to respond to Van Elk's argument that California – by limiting the scope of *Hoffman* by making immigration status "irrelevant" to claims under California law, Cal. Lab. Code § 1171.5(a), Cal. Gov. Code § 7285(a), Cal. Civ. Code § 3339(a) – acted in conflict with the intent of Congress, frustrated federal law, and sought to circumvent the Supremacy Clause. Moreover, Respondents have failed to demonstrate why the Court of Appeals' lenient analysis of the preemption doctrine to enable it to uphold these statutes is not in conflict with the holdings of this Court.

CONCLUSION

For the reasons set forth above and in its Petition, Van Elk respectfully requests that this Court grant the Petition to determine whether this Court's holding in *Hoffman* applies to prevailing wages and whether California's post-*Hoffman* statutes are contrary to the preemption doctrine.

Respectfully submitted,

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